REINU BALAKRISHNAN

v.

DR MOHAMADON ABDULLAH & ORS

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: MT1-22-103-2000]
4 FEBRUARY 2002

CIVIL PROCEDURE: *Costs - Interlocutory proceedings - Whether costs should be ordered to be paid forthwith at the conclusion of proceedings - Power of court to order costs under O. 59 r. 4(1) Rules of the High Court 1980 - General rule as to costs in respect of interlocutory proceedings - Whether costs only to be paid at the end of main action - Exceptions*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction application - Costs of application - Whether costs should be ordered to be paid forthwith upon dismissal of application - Power of court to order costs under O. 59 r. 4(1) Rules of the High Court 1980 - Whether application a "proceeding" within O. 59 r. 4(1) - Courts of Judicature Act 1964, s. 3 - General rule as to costs in respect of interlocutory proceeding - Whether costs only to be paid at the end of main action - Exceptions*

CIVIL PROCEDURE: *Damages - Interim order - When to be assessed and paid*

The plaintiff applied for an interlocutory injunction in encl. 9 to restrain the sixth defendant from proceeding with a disciplinary inquiry against him. Pending the hearing of encl. 9, the plaintiff obtained an interim order. However, after hearing submissions, the court dismissed encl. 9. The issue herein was whether costs in respect of encl. 9 should be taxed and paid forthwith or at the conclusion of the main action. In addition, whether damages in respect of the plaintiff's undertaking as to damages for the interim order should be assessed and also paid forthwith.

Held:

[1] An application for an interlocutory injunction is a "proceeding" as defined by s. 3 of the Courts of Judicature Act 1964. As the Rules of the High Court 1980 ('RHC') is a subsidiary legislation made by the Rules Committee pursuant to s. 16 of the Courts of Judicature Act 1964, the definition of "proceeding" under the Act applies to subsidiary legislation under the Act, and this includes the RHC. Therefore, under O. 59 r. 4(1)

RHC the court has the power to order a party to an interlocutory proceeding to pay costs forthwith to the other party, if the court so deems fit. (p 234 d-g)

[2] As a general rule, costs in respect of an interlocutory proceeding, should only be paid at the end of the action. However, there were exceptions to the general rule, *ie*, that the court may order that costs be paid forthwith when the party against whom the order has been made: (a) has been guilty of oppressive conduct; (b) has been guilty of unreasonable conduct; (c) has taken unnecessary action; or (d) has taken improper action. (p 235 b-f)

[3] The plaintiff should have requested the sixth defendant who was his employer to refer the dispute concerned to the Director General for Industrial Relations pursuant to s. 18(1) of the Industrial Relations Act 1967, or alternatively the plaintiff should have proceeded with the disciplinary inquiry. In the event he was found guilty of any of the charges and dismissed at the conclusion of the inquiry, he should then refer the dispute to the Director General for Industrial Relations pursuant to s. 20 of the said Act. The plaintiff, therefore, in applying for an interlocutory injunction against the sixth defendant, had taken an improper action. Accordingly, applying the above principles, costs must be taxed and paid forthwith by the plaintiff to the sixth defendant. (p 236 b-e)

[4] In view of the fact that the plaintiff when applying for the interim order had given an undertaking as to damages, there was no reason why damages should not be assessed and paid forthwith. (p 236 f)

[Costs to be taxed and paid forthwith; damages to be assessed and paid forthwith.]

Case(s) referred to:

Chow Yong Hong v. Chow See Lim & Anor [1959] 25 MLJ 23 ***(foll)***

Hai Yue Hin v. Public Feedmill (M) Sdn Bhd [1997] 4 CLJ 555 ***(foll)***

Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 16

Industrial Relations Act 1967, ss. 18(1), 20

Rules of the High Court 1980, O. 59 r. 4(1)

For the plaintiff/applicant - Cantius Leo Cameons; T/n C Leo Cameons

For the 6th defendant/respondent - Rosli Dahlan; M/s Allen & Gledhill

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Yunus J:

The plaintiff is a pilot with the Malaysian Airline System Berhad (hereinafter referred to as "MAS"), that is to say, the sixth defendant. On 4 February 2000, he filed a suit against the first, second, third, fourth and fifth defendants for conspiracy. It is alleged in the statement of claim that these five defendants, all employees of MAS, conspired to defraud and to injure the plaintiff.

Subsequently, the plaintiff by summons in chambers (encl. 5) applied to amend the writ so as to add MAS as the sixth defendant and to include averments against MAS in the statement of claim. The application is yet to be heard, but in the meantime, on 11 April 2001, the court (Mohd Noor Ahmad J as he then was) allowed the writ to be amended – but only to include MAS as the sixth defendant in the writ.

Thereafter, on 20 April 2001, the plaintiff filed a further application *vide* encl. 9. Enclosure 9 is an interlocutory application by the plaintiff for an interlocutory injunction to restrain the sixth defendant (MAS) from proceeding with a disciplinary inquiry against him.

Pending the hearing of encl. 9, upon the application of the plaintiff, the court granted an interim order restraining the sixth defendant from proceeding with the disciplinary inquiry until the disposal of encl. 9, subject to the usual undertaking by the plaintiff as to damages.

Subsequently, after considering and hearing both oral and written submissions on encl. 9, I dismissed the plaintiff's interlocutory application (encl. 9).

On the question of costs in regard to encl. 9, an issue arises as to when must the costs be paid by the plaintiff to the sixth defendant. The learned counsel for the sixth defendant, Encik Rosli Dahlan, applies to the court that costs be taxed and paid forthwith. But the learned counsel for the plaintiff, Encik Cantius Leo, on the other hand objects and contends that the costs should be taxed and paid only after the conclusion of the main action.

In addition, there is also a dispute as to when damages against the plaintiff in respect of the undertaking as to damages, given by the plaintiff when applying for the interim order, should be assessed and paid. The sixth defendant applies to the court to have the damages assessed and be paid forthwith, but the plaintiff insists that damages, if any, should only be assessed at the end of the action.

I shall deal with the issue of costs first.

On this issue, after considering the written submissions, the facts of the case and the principles, I am of the opinion that costs should be taxed and paid forthwith by the plaintiff to the sixth defendant.

I shall give my reasons.

Order 59 r. 4(1) of the Rules of the High Court (the RHC) provides:

> **4. Stage of proceedings at which costs to be dealt with (O. 59 r. 4)**
>
> (1) Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

It will be noted that the above provision uses the word "proceedings". It might be asked whether "proceedings" include an interlocutory application such as encl. 9, which is an application for an interlocutory injunction? The answer, in my opinion, must be in the affirmative. Although neither O. 59 nor the RHC provides for a definition of "proceedings", nevertheless "proceeding" is defined by s. 3 of the Courts of Judicature Act 1964 as follows:

> "proceeding" means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

In my view, the phrase "an application at any stage of a proceeding" in the above definition includes an interlocutory application such as encl. 9.

The RHC is a subsidiary legislation made by the Rules Committee pursuant to s. 16 of the Courts of Judicature Act. Therefore, the definition of "proceeding" under the Act applies to subsidiary legislations under the Act, and this includes the RHC.

Thus under O. 59 r. 4(1) of the RHC the court has the power to order a party to an interlocutory proceeding to pay costs forthwith to the other party to the same, if the court so deems fit.

Now, granted that the court has the power to order that costs be paid forthwith, how should the court exercise that power? Under what circumstances can a court, in dealing with an interlocutory proceeding, order that costs be paid by a party forthwith?

Certain principles (here I am only concerned with the principles that are relevant for our purpose) can be abstracted from the following cases:

(1) *Chow Yong Hong v. Chow See Lim & Anor* [1959] 25 MLJ 23;

(2) *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304; and

(3) *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd* [1997] 4 CLJ 555.

In *Chow Yong Hong* the court ruled that as a general rule costs in respect of an interlocutory proceeding should only be paid – not forthwith – but at the end of the action. Smith J held (at p. 24):

> It appears to me, therefore, that the proceedings are purely interlocutory and should *prima facie* follow the general rule of interlocutory proceedings and that costs should be settled at the end of the action.

In *Ko Ko Ma* the above principle in *Chow Yong Hong* was adopted by the court. Mohamed Dzaiddin J (as he then was) held (at p. 305):

> Therefore, in the circumstances of the whole case, I come to the following conclusion. First, I adopt the decision of Smith J in *Chow Yong Hong* who held that where the proceedings were purely interlocutory, costs should follow the general rule that it should be settled at the end of the action.

However, having stated the above principle, the court went on to state the further principle – the exceptions to the general rule – that in respect of an interlocutory proceeding the court may order that costs be paid forthwith when the party against whom the order has been made:

(a) has been guilty of oppressive conduct;

(b) has been guilty of unreasonable conduct;

(c) has taken unnecessary action; or

(d) has taken improper action.

The learned judge ruled (at p. 305):

> Secondly, an order for interlocutory costs should only be made payable forthwith or in any event when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct (*Graham v. Sutton, Carden & Co* [1897] 2 Ch 367) or the other party has taken unnecessary or improper action (David Beans in *Injunction* (3rd Ed) p. 62).

All the above principles were cited with approval by the Court of Appeal in *Hai Yue Hin*. The Court of Appeal held (at p. 559):

Having given our utmost consideration to the arguments and the authorities cited, we agree and adopt the interpretation given in the two decisions in *Chow Yong Hong* and *Ko Ko Ma Pony Horse Centre*, as being the more proper and true interpretation of O. 59 r. 4(1).

Now, in dismissing the interlocutory application at encl. 9, I held that the plaintiff had failed to show that he had a cause of action against the sixth defendant. I also held that the dispute between the plaintiff and MAS was a domestic as well as a trade dispute and as such the court was not the proper forum to adjudicate the dispute. The plaintiff should have requested MAS, who was his employer, to refer the dispute to the Director General for Industrial Relations pursuant to s. 18(1) of the Industrial Relations Act 1967 (the IRA). Or, alternatively, the plaintiff should proceed with the disciplinary inquiry, instead of asking this court to halt the disciplinary inquiry; and in the event that, at the conclusion of the inquiry by the Board of Inquiry and the appeal to the Board of Directors, he is found guilty of any of the charges and dismissed, he should then refer the dispute to the Director General for Industrial Relations pursuant to s. 20 of the Act.

In the light of the above stated reasons for rejecting the interlocutory application, it is therefore my judgment that the plaintiff, in applying *vide* encl. 9 for an interlocutory injunction against the sixth defendant, had taken an improper action. Accordingly, applying the above principles, costs must be taxed and paid forthwith by the plaintiff to the sixth defendant.

Now, on the question of assessment of damages, in view of the fact that the plaintiff, when earlier applying for the interim order, had given an undertaking to this court as to damages, meaning that he has agreed to pay damages to the sixth defendant in the event that he is unsuccessful in his application for the interlocutory injunction, I see no reason why damages should not be assessed and paid forthwith. Hence, damages to be assessed (by the registrar) and paid forthwith.

Costs to be taxed and paid forthwith; damages to be assessed and paid forthwith.